THE FOURTH THOMAS J. ROMIG LECTURE ON PRINCIPLED LEGAL PRACTICE*

CALVIN M. LEDERER †

I think of myself as a practical lawyer, so let me begin with the end in mind. What is principled legal practice?

Drawing on many definitions, I discern that to be "principled" means to have strong beliefs or convictions that are morally upright, to distinguish between right and wrong, and to behave in a manner consistent with those ideals. Adding in the element of legal practice, I further discern that principled legal practice means that a lawyer's beliefs—strongly held and consistently adhered to—should be plausibly within the broadest reasonable construction of existing law[1] and that the lawyer's conduct in

---

* This is an edited transcript of remarks delivered on September 11, 2023 to members of the staff and faculty, distinguished guests, and officers attending the 72nd Graduate Degree Program at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. This lecture is in honor of Major General (Retired) Thomas J. Romig. The views expressed do not represent the views of the U.S. Coast Guard, the Department of Homeland Security, or any other agency of the United States.

† Calvin M. Lederer is Deputy Judge Advocate General of the U.S. Coast Guard and was appointed to the Senior Executive Service in June 2002 after his retirement as a colonel in the Judge Advocate General's Corps, U.S. Army. His Army service included service in Washington, D.C., as Executive Officer to The Judge Advocate General and the Army's Chief Legislative Counsel, Chief Environmental Law Counsel, and Chief Labor and Employment Law Counsel. In addition to other field assignments in the United States and overseas, he was Commandant of The Judge Advocate General's School, Staff Judge Advocate for V Corps, and Deputy Staff Judge Advocate for the 25th Infantry Division. He defended Department of Defense programs and policies in the Federal courts early in his career and served as Special Counsel to the Assistant Attorney General for the Civil Division in conjunction with a Senior Service College Fellowship.

[1] Compare this formulation with Rule 11(b)(2) of the Federal Rules of Civil Procedure, which requires that legal contentions represented to the court "are warranted by existing law or by a nonfrivolous argument for extending. modifying, or reversing existing law or for establishing new law." FED. R. CIV. P. 11(b)(2). The Advisory Committee's Notes relate:

> Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments.

pursuing those beliefs should conform with the law and professional rules and norms.

That definition aligns generally with the Army Judge Advocate General's Corps definition of "Principled counsel," which is "professional advice on law and policy grounded in the Army Ethic and enduring respect for the Rule of Law, effectively communicated with appropriate candor and moral courage, that influences informed decisions."[2]

The balance of my presentation is to elaborate on the concept, share principles developed in my current legal practice, and discuss two historical, high-profile examples where principled legal practice was challenged. Since today is the anniversary of the September 11 attacks, the first example is the post-9/11 response of the Office of Legal Counsel at the Department of Justice that set the course for the executive branch. The second is the internment of Japanese Americans in World War II.

Last year, an American Bar Association standard instructed law schools to provide opportunities to develop "a professional identity."[3] "Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society," and

---

> However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

FED. R. CIV. P. 11 advistory committee's note to 1993 amendment. *See, e.g., In re* Sargent, 136 F.3d 349, 352 (4th Cir. 1998), *cert. denied sub nom.,* Cox v. Sargent, 525 U.S. 854 (1998) ("An assertion of law violates Rule 11(b)(2) when, applying a standard of objective reasonableness, it can be said that 'a reasonable attorney in like circumstances could [not have] believe[d] his actions to be . . . legally justified.' A legal contention is unjustified when 'a reasonable attorney would recognize [it] as frivolous.' Put differently, a legal position violates Rule 11 if it 'has 'absolutely no chance of success under the existing precedent.'" (citations omitted)).

[2] DEP'T. OF THE ARMY, FIELD MANUAL 3-84, LEGAL SUPPORT TO OPERATIONS 1-1 (1 Sep. 2023). Principled counsel is a component of the mission statement to "provide principled counsel and premier legal services, as committed members and leaders in the legal and Army professions, in support of a ready, globally responsive, and regionally engaged Army." *Cf.* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 3-2 (24 Jan 2017).

[3] ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023, Standard 303(b) (AM. BAR ASS'N 2022).

"embraces the values and guiding principles that are foundational to your legal practice."[4]

As judge advocates and attorneys, we have much in common that guides us. Our professional identity is partly the product of armed service and professional culture, norms, ethical and legal principles, and black letter law. That creates a baseline professional identity. I have observed over a long time that judge advocates, across all the armed services, display a remarkably similar apparent professional identity. But we are all individuals, and those commonalities do not fully define our individual professional identity.

What are your individual values that drive your words, actions, and decisions? Law and rules are where we all are comfortable to go to guide us. However, exploring your personal values and personal guiding principles requires going into a murky place that we may occasionally visit but seldom dwell.

The sum of this is your professional identity, which becomes crucial when you face a professional crisis that may compel you to define a line in the sand you will not cross or, perhaps, cross and enter uncertain and dangerous terrain.

Principled legal practice means observing and following black letter law and principles of jurisprudence. There are rules that provide right and left limits to legal practice, principally the Model Rules of Professional Conduct.[5] The Preamble of the Rules[6] tells us to resolve conflicting

---

[4] *Id.* at Interpretation 303-5. Provided in its entirety: "Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice." *Id.*

[5] MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020). The Services have substantially adopted the rules. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (28 June 2018); U.S. DEP'T OF NAVY, JAG INSTR 5803.1D, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, Sec. 3, R. 3.8 (1 May 2012), (C1, 20 Jan. 2015) (*see* 32 C.F.R. Part 776); U.S. DEP'T OF AIR FORCE, INSTR. 51-110, PROFESSIONAL RESPONSIBILITY PROGRAM (11 Dec. 2018); U.S. COAST GUARD, COMDTINST M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM (1 June 2005).

[6] MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020). The Preamble reviews several core principles, including: zealous representation under the rules of the adversary system; negotiating to seek an advantageous result consistent with honest dealing; keeping in confidence information relating to representation except as required or permitted by

responsibilities by our "moral judgment guided by the basic principles underlying the rules,"[7] and that moral judgments should be "guided by personal conscience and the approbation of professional peers."[8]

Consider the notion that moral judgments should be guided, in part, by the approbation of professional peers. I perceive that this means that our professional conduct should align with the collective values and norms shared by our peers, thereby meriting their respect.

Those of us who counsel commanders and other principals are "advisors," and under Rule 2.1, advisors are required to "exercise independent professional judgment and render candid advice."[9] The commentary explains that "a client is entitled to straightforward advice expressing the lawyer's honest assessment" and a lawyer "should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."[10] This is critical to principled practice, and we will encounter it again later in my remarks. Complementing that is Rule 1.1, which states, "competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[11] This may seem to be self-evident to you, but it will come up again when we consider the post-9/11 practice of the Office of Legal Counsel.

In the Coast Guard, we introduce to every new judge advocate seven principles to guide legal practice.[12] These principles are different from the joint and armed service doctrines on legal support, which tell us what we

---

rules or law; using legal process for legitimate purposes and not to harass or intimidate; respecting the legal system and those who serve it, upholding legal process when challenging official action; and improving the law, public understanding and confidence, access to the legal system, the administration of justice and quality of service rendered by the profession. *Id.*

[7] *Id. See also* MODEL RULES OF PRO. RESP. r. 2.1 (AM. BAR ASS'N 2020). This states that legal advice "may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant." *Id.*

[8] MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020).

[9] *Id.*

[10] MODEL RULES OF PRO. RESP. r. 2.1 cmt. (AM. BAR ASS'N 2020).

[11] *Id.* r. 1.1.

[12] U.S. Coast Guard, Principles of Legal Practice Linked to Principles of Coast Guard Operations (2023), https://www.uscg.mil/Portals/0/Headquarters/Legal/Home_doc/CGJAG%20Guiding%20Principles%202023.pdf?ver=X5zehGPZ2YS5digSqx2IBQ%3d%3d [hereinafter Coast Guard Principles of Legal Practice].

do functionally and how we organize to do it.[13] Our principles of practice are linked to the seven Principles of Coast Guard Operations[14] that have evolved from the unique nature of our eleven statutory missions,[15] whose scope includes national defense, saving lives, incident and crisis management, law enforcement, environmental and industry regulation, facilitating maritime commerce, and maritime governance.

1. Clear Objective: *Understand the mission, context, and the task at hand. Drive to a desired and desirable outcome that enables mission execution and is consistent with the Constitution, law, and policy.*

The greatest strength of judge advocates, across all services, is our appreciation for the military mission and our focus on legal advice that supports legally executable missions. This principle emphasizes not just the desired outcome, which is the client's objective, but also what outcome is desirable—that is, the consistency of the desired outcome with broader interests of the service, the Constitution, and the Nation. Assessing what

---

[13] JOINT CHIEFS OF STAFF, JOINT PUB. 3-84, LEGAL SUPPORT (2 Aug. 2016); U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS (8 June 2020); U.S MARINE CORPS, ORDER 5800.16-VI, LEGAL SUPPORT AND ADMINISTRATION MANUAL (20 Feb. 2018); U.S DEP'T OF AIR FORCE, DOCTRINE PUB. 3-84, LEGAL SUPPORT TO OPERATIONS (24 Jan. 2020). In the Coast Guard, Principles for the Delivery of Legal Services comprise organizational doctrine and to some degree echo the principles that guide individual practice. Coast Guard Principles of Legal Practice*, supra* note 12. These principles are organized under two overarching principles: "We serve to support Coast Guard missions and people" and "We all share responsibility for the delivery legal services." *Id.* Under the first are these four principles: (1) Provide every leader with a lawyer, ethical advisor, and counselor; (2) Identify issues and provide risk-based options to achieve mission success while flexibly applying and preserving Coast Guard authorities; (3) Drive to desired and desirable outcomes within the letter and spirit of the law; promote the principles of Coast Guard operations; and (4) Be active and not passive: deliver services that are on time, right, and precise and that are anticipatory, innovative, and responsive. *Id.* Under the second are these principles: (1) We are one team; there is no wrong legal office to call; (2) Services are aligned and consistent, and integrated across subject matter and commands; (3) We work together to ensure justice and fairness; we demand in each other candor, collegiality, ethical conduct, and personal accountability; and (4) CGJAG leaders communicate directly with one another regardless of rank or position to protect Coast Guard and public interests; (5) CGJAG applies resources without geographic or organizational limitation to support mission execution; and (6) Every counsel will have a senior counsel; we seek review of work product from a superior, peer or subordinate counsel when we can; we will act deliberately and decisively when senior counsel is unavailable. *Id.*

[14] U.S. COAST GUARD, PUB 1, DOCTRINE FOR THE U.S. COAST GUARD 73-75 (Feb. 2014).

[15] 6 U.S.C. § 648.

is desirable means thinking beyond the immediate mission need, implicates uncertain assumptions and possible outcomes, involves the lawyer's role as counselor and legal advisor, and may take the lawyer to the edge of the lawyer's core expertise.[16]

2. Effective Presence: *Be active and prepared. Provide precise, actionable, and correct legal advice or counsel when and where it is needed most. Seek physical presence at the point of decision and "take the pen" when it will advance the mission.*

Being active and not passive means speaking up, particularly when others are rash or overlook opportunities or constraints. "Taking the pen" often facilitates and expedites effective decision-making, where the lawyer takes care not to abandon the role of counselor and legal advisor.

3. Unity of Effort: *Integrate and respect the authorities, capabilities, and perspectives of partners, assembling and relying on diverse legal teams and collaboration.*

4. On-Scene Initiative: *Act deliberately and decisively when remote senior counsel is unavailable.*

I suspect many of you can relate to this from your deployed experiences. One of our Principles for the Delivery of Legal Services is to provide every lawyer with a senior counsel, but that counsel may not always be available. We have confidence in our judge advocates in all grades and will support them when they must act independently, which we know will occur regularly, particularly during contingency response.

---

[16] *See* Charles J. Dunlap, Jr., *A Tale of Two Judges: A Judge Advocate's Reflections on Judge Gonzales's Apologia*, 49 TEX. TECH. L. REV. 893, 897 (2010) ("[Judge advocates] conceive themselves much as Harold Koh, Legal Adviser to the U.S. State Department, envisions the role of his lawyers—that is, as counselors for their government clients, who 'also serve as a conscience for the U.S. Government with regard to international law.' A State Department lawyer, he says, 'offers opinions on both the wisdom and morality of proposed international actions.' Similarly, experience demonstrates that both military and civilian leaders 'expect judge advocates to discuss nonlegal factors along with technical legal advice' in their opinions." (citations omitted)).

5. Flexibility: *Adjust past experience, knowledge, and abilities to the contingency at hand. Remember that swift linear or parallel change in the character and demands of a response is the rule and not the exception.*

6. Managed Risk: *Provide advice and options based on the best facts and law available, accepting legal risk to achieve the mission without placing people or the Service in jeopardy. Remember that the decision maker, not the attorney, decides with a sound understanding of the risks.*

Experienced lawyers know there are seldom definitive answers to legal questions in the text of law and regulations.[17] We propose our best assessment linked to risk, and we should define the nature of risk with specificity and quantify it.

7. Restraint: *Relentlessly seek to enable to mission execution, but always provide an accurate and honest appraisal of applicable law – even if it may constrain operations. Respect the civil liberties and dignity of Americans and others; preserve and protect Coast Guard foundational legal authorities.*[18]

We view restraint in all these respects as perhaps the most important of these principles to guide our practice at all times.

Principles of practice are useful in our day-to-day practice, but high-stakes issues challenge our individual foundational principles—and determine whether we respond in a principled way. Let's look at lawyers under pressure, beginning with the post-9/11 period.

---

[17] *But cf.* Milan Markovic, *Advising Clients After Critical Legal Studies and the Torture Memos*, 114 W. VA. L. REV. 109, 148-49 (2011) (discussing the "indeterminacy thesis" that most, if not all, legal rules can be interpreted in a variety of ways).

[18] The Coast Guard has numerous authorities, some of which provide expansive authority, that are challenged from time to time in litigation. Among the most foundational and wide-ranging authorities is 14 U.S.C. § 522, which dates to §§ 31and 64 of the Act of August 4, 1790, ch. XXXV, and today provides in § 522(a): "The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance . . . ." This authority, which includes powers of arrest and seizure, is a principal basis for boarding vessels and detention of persons.

The Office of Legal Counsel Torture Memos After 9/11

The Office of Legal Counsel (OLC) exercises the Attorney General's authority to advise the President and executive agencies.[19] The OLC feels its responsibilities heavily because while some opinions may be tested in court, most won't, and its opinions comprise controlling law for the executive branch. The two dozen or so OLC lawyers come from the most prestigious law schools and OLC lawyers go on to impactful positions in government, including the Supreme Court.[20]After September 11, the Bush-era OLC was at the apex of a legal establishment shifting to a wartime footing.

One of the reasons it is appropriate to discuss OLC's post-9/11 practice today is that the genesis of the foundation of the Romig chair was the controversy over the Department of Defense (DoD) interrogation policy 20 years ago. This was inextricably linked to OLC interpretation. There is no better example of principled legal practice than the stand against that policy by Major General Romig, the other Judge Advocates General, the Staff Judge Advocate to the Commandant, and others like Navy General Counsel Alberto Mora—the first Romig lecturer.[21] I recommend to you Mr. Mora's 2019 lecture, in which he articulately sets forth the moral, policy, and systemic implications of the DoD policy.

The second reason is that the context was crisis, and you will likely face crisis in the future.

The third reason is that the OLC sits atop the legal hierarchy of the executive branch, both literally and figuratively, and it should be the paradigm of how government lawyers should ordinarily practice. Assessing OLC's work against neutral principles of legal practice can be helpful to us as we consider how we practice.

The work we'll talk about was produced from 2001 to 2003. The principal actor is Deputy Assistant Attorney General John Yoo, who came to the Office of Legal Counsel from Berkeley Law School and returned

---

[19] 28 C.F.R. § 0.25 (2022).

[20] Chief Justice William H. Rehnquist and Justice Antonin G. Scalia served as Assistant Attorney General for the Office of Legal Counsel under Presidents Nixon (1969-1971) and Ford (1974-1977), respectively. Attorneys General Nicholas Katzenbach and William P. Barr served as Assistant Attorney General under Presidents Kennedy (1961-1962) and George H. W. Bush (1989-1990), respectively.

[21] A. Mora, *The First Thomas J. Romig Lecture in Principled Legal Practice*, 227 MIL. L. REV. 433 (2019).

there after he resigned in May 2003.[22] Yoo reported to Assistant Attorney General Jay Bybee, who joined OLC in November 2001 and served there until he resigned in March 2003 to become a judge on the U.S. Court of Appeals for the Ninth Circuit.[23]

Bybee figures significantly in the story, but this is more about Professor Yoo. As John Yoo has related, he was known at the time—and since—for his work on the historical understanding of the Constitution's war powers.[24] He was the OLC expert on foreign policy and national security issues and has been described even by a critic as indispensable after 9/11.[25]

Over the eighteen months following 9/11, the OLC was prolific.[26] Much of this advice was classified—at least initially. Yoo was the author or driving force behind most of this work.

---

[22] OFF. OF PRO. RESP., DEP'T OF JUSTICE, REPORT, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 25-27 (July 29, 2009) [hereinafter OPR REPORT].

[23] *Id.* at 25.

[24] *Id.* at 26.

[25] JACK GOLDSMITH, THE TERROR PRESIDENCY 167-68 (2007) [hereinafter THE TERROR PRESIDENCY]. Former Assistant Attorney General Jack Goldsmith said, "Yoo was indispensable after 9/11; few people had the knowledge, intelligence, and energy to craft the dozens of terrorism related opinions he wrote." *Id.*

[26] *See generally,* OLC FOIA ELECTRONIC READING ROOM, https://www.justice.gov/olc/olc-foia-electronic-reading-room (last visited Jan. 23, 2025); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. to Att'y Gen., subject: Constitutionality of Expanded Electronic Surveillance Techniques Against Terrorists (Nov. 2, 2001); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. and Special Counsel, Off. of Legal Counsel, to Counsel to the President, subject: Treaties and Laws Applicable to the Conflict in Afghanistan and to the Treatment of Persons Captured by U.S. Armed Forces in that Conflict (Nov. 30, 2001); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. to Gen. Counsel, Dep't of Def., subject: Possible Criminal Charges Against American Citizen Who Was a Member of the al Qaeda Terrorist Organization or the Taliban Militia (Dec. 21, 2001); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. to Gen. Counsel, Dep't of Def., subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen. to Counsel to the President and Gen. Counsel, Dep't of Def., subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen. to Deputy Att'y Gen., subject: Memorandum From Alberto Gonzales to the President on the Application of the Geneva Convention to Al Qaeda and the Taliban (Jan. 26, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen. to Counsel to the President, subject: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (Feb. 7, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen.

In an opinion two weeks after 9/11,[27] Yoo declared that the President had the broadest discretion in responding to things like the 9/11 attacks, telling the White House, "The power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces, because the power of Commander in Chief is assigned solely to the President."[28]

Here are some of the conclusions in subsequent opinions:

- The President could deploy the military domestically against terrorists operating within the United States.[29]

---

to Gen. Counsel, Dep't of Def., subject: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan (Feb. 26, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen. to Gen. Counsel, Dep't of Def., subject: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations (Mar. 13, 2002). *See* OPR REPORT, *supra* note 22, at 118; Memorandum from Deputy Assistant Att'y Gen., Off. of Legal Counsel, to Assistant Att'y Gen., Off. of Legis. Aff., subject: Swift Justice Authorization Act (Apr. 8, 2002); Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, to the Att'y Gen., subject: Determination of Enemy Belligerency and Military Detention (June 8, 2002); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Counsel, to Assistant Att'y. Gen., Off. of Legis. Aff., subject: Applicability of 18 U.S.C § 4001(a) to Military Detention of United States Citizen (June 27, 2002); Letter from John Yoo, Deputy Assistant Att'y Gen., Off. of Legal Counsel, to John Rizzo, Acting Gen. Counsel, Cent. Intel. Agency (July 13, 2002), https://www.justice.gov/sites/default/files /olc/legacy/2009/08/24/letter-rizzo2002.pdf.

[27] President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188 (2001).

[28] While reciting that the President had exceptionally broad power to take military action based on his constitutional Commander-in-Chief authority, the opinion also relied on the additional authority conferred by Congress in the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing "all necessary and appropriate force" against any person, organization, or State suspected of involvement, and to deploy military force preemptively against terrorist organizations or States that harbored or supported them whether or not linked to the specific terrorist incidents of September 11), and also the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548).

[29] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., and Robert J. Delahunty, Special Counsel, Off. of Legal Counsel for Alberto Gonzales, Counsel to the President and William J. Haynes II, Gen. Counsel, Dep't of Def., subject: Authority for Use of Military Force to Combat Terrorist Activities *Within the United States* (Oct. 23, 2001) (emphasis added). The opinion stated that the President had "ample constitutional and statutory authority to deploy the military against international or foreign terrorists operating within the United States," notwithstanding the Posse Comitatus Act, 18 U.S.C. § 1385, the Insurrection Act, 10 U.S.C. §§ 331-335, and the Fourth Amendment, U.S. CONST. amend. IV.

- The President had broad discretion to authorize warrantless electronic surveillance advice.[30]
- The Geneva Conventions[31] did not apply to al-Qaeda[32] or the Taliban.[33]
- Military members were not subject to prosecution under the War Crimes Act, which criminalizes grave breaches of the Geneva Conventions.[34]

Three memos in 2002 and 2003 would later be called the "Torture Memos."

Interrogation was a novel issue for the OLC, prompted by the Central Intelligence Agency's (CIA) capture of al-Qaeda's Abu Zubaydah in Pakistan. Bybee signed the two August 2002 memos that addressed CIA

---

[30] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. to Att'y Gen., subject: Constitutionality of Expanded Electronic Surveillance Techniques Against Terrorists (Nov. 2, 2001).

[31] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

[32] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. and Special Counsel, Off. of Legal Counsel, to Counsel to the President, subject: Treaties and Laws Applicable to the Conflict in Afghanistan and to the Treatment of Persons Captured by U.S. Armed Forces in that Conflict (Nov. 30, 2001).

[33] *Id.* In January 2002, two months after joining Office of Legal Counsel, Jay Bybee signed an opinion reiterating most of the earlier Yoo opinion plus additional views, including the conclusion that departures from the standard of treatment in Common Article 3 could "be justified by some basic doctrines of legal excuse" such as national self-defense, and offered additional rationale why the third Geneva Convention Relative to the Treatment of Prisoners of War would not apply to the Taliban. Memorandum from John C. Yoo Deputy Assistant Att'y Gen. to Gen. Counsel, Dep't of Def., subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002).

[34] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A(Aug. 1, 2002). *See* War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified at 18 U.S.C. § 2441). Grave breaches include torture or inhumane treatment, or willfully causing great suffering or serious injury to body or health. *See* Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Counsel, to Assistant Att'y. Gen., Off. of Legis. Aff., subject: Applicability of 18 U.S.C § 4001(a) to Military Detention of United States Citizen (June 27, 2002).

interrogation,[35] but John Yoo principally authored them.[36] Yoo signed the March 2003 memo that addressed military interrogation.

The first Bybee memo narrowly defined torture in the criminal statute[37] that implements the Convention Against Torture.[38] The statute makes criminal acts specifically intended to inflict severe physical or mental pain or suffering.[39] The Bybee memo asserted that physical pain must be of an intensity that accompanies serious physical injury such as death or organ failure, and mental pain requires suffering not just at the moment of infliction but also lasting psychological harm, such as those seen in mental disorders. This opinion, which John Yoo referred to in email traffic as the "bad things opinion,"[40] added that prosecution for interrogations undertaken pursuant to Commander-in-Chief powers may be unconstitutional because "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."[41] The opinion also concluded that necessity or self-defense could eliminate any criminal liability.

A second, classified, Bybee opinion, based on the first, posed no legal objection to specified interrogation techniques proposed by the CIA.[42]

---

[35] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, at 35, 39 (Aug. 1, 2002).

[36] OPR REPORT, *supra* note 22, at 1.

[37] Pub. L. No. 103-236, 108 Stat. 463, § 506 (1994) (codified at 18 U.S.C. §§ 2340-2340A).

[38] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20 (1988).

[39] Under the Act, severe mental pain or suffering means prolonged mental harm caused by or resulting from, among other things, the intentional infliction or threatened infliction of severe physical pain or suffering, or the threat of imminent death. Pub. L. No. 103-236, 108 Stat. 463, § 506 (1994) (codified at 18 U.S.C. §§ 2340-2340A).

[40] OPR REPORT, *supra* note 22, at 45.

[41] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, at 35 (Aug. 1, 2002).

[42] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, to John Rizzo, Acting Gen. Counsel, Cent. Intel. Agency, subject: Interrogation of al Qaeda Operative (Aug. 1, 2002).

The March 2003 Yoo memo to the DoD[43] addressed military interrogations of unlawful combatants, echoing the earlier opinions.[44]

What was the aftermath? In June 2004, the first August 2002 Torture Memo was leaked to the press,[45] and a furor erupted in the media, in Congress, internationally, and in the legal profession. Later that month, Justice Department officials met with reporters to tell them the memo had been withdrawn.[46]

The key player in withdrawal was Jack Goldsmith, who replaced Bybee as Assistant Attorney General in October 2003.[47] Goldsmith rolled

---

[43] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Counsel, to William J. Haynes, II, subject: Military Interrogation of Unlawful Combatants Held Outside the United States (Mar. 14, 2003).

[44] The opinion declared that the War Crimes Act of 1996, 18 U.S.C. § 2441, did not apply to military personnel because Common Article 3 of the Geneva Conventions did not apply to al-Qaeda or the Taliban, as the OLC had earlier opined. The opinion also restated the proposition that interrogations conducted on Presidential authority superseded the restrictions in the law anyhow. *Id.*

[45] OPR REPORT, *supra* note 22, at 1.

[46] *Id.* at 123. Before the 2002 Bybee memo became public, Assistant Attorney General Jack Goldsmith told the Department of Defense (DoD) in December 2003 not to rely on the Yoo memorandum. Goldsmith advised that twenty-four interrogation techniques approved by the Secretary of Defense in April 2003 for use with al-Qaeda and Taliban detainees at Guantanamo Bay Naval Base were authorized in accordance with limitations and safeguards authorized by the Secretary, notwithstanding withdrawal of the 2003 Yoo memo. THE TERROR PRESIDENCY, *supra* note 25, at 152-55. The 2002 Bybee memo was formally withdrawn after Goldsmith resigned: Letter from Daniel B. Levin, Acting Assistant Att'y Gen., Off. of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., subject: Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003), (Feb. 4, 2005). The Bybee memorandum was formally withdrawn in December 2004. Memorandum from Daniel B. Levin, Acting Assistant Att'y Gen., Off. of Legal Counsel, to the Deputy Att'y Gen., subject: Legal Standards Applicable under 18 U.S.C. § 2340-2340A (Dec. 30, 2004).

[47] Goldsmith, a law professor since 1994, joined the DoD Office of General Counsel (OGC) and worked on international law issues from September 2002 until July 2003. OPR REPORT, *supra* note 22, at 27. He was solicited by DoD General Counsel Haynes to join OGC as Special Counsel, having heard about him from John Yoo. Goldsmith described himself as a conservative intellectual and "new sovereigntist" "skeptical about the creeping influence of international law on American law." THE TERROR PRESIDENCY, *supra* note 25, at 20-21. When Bybee was nominated for the Judiciary, White House allies, including White House Counsel Alberto Gonzales and the Vice President's Counsel, David Addington, advocated for John Yoo to replace Bybee. Attorney General John Ashcroft, who had "uneven relations" with the White House objected, and Goldsmith became the alternative. *Id.* at 22-25. He resigned in July 2004. OPR REPORT, *supra* note 22, at 27.

back several opinions,[48] including the 2003 Yoo memo on military interrogation.[49] The Department of Justice (DOJ) later limited seven additional memoranda and, in particular, rolled back the 2002 Yoo opinion that the armed forces could be employed domestically to combat terrorism.[50]

Congress enacted the Detainee Treatment Act of 2005, prohibiting cruel, inhuman, or degrading treatment.[51] In 2006, the Supreme Court decided that Common Article 3 of the Geneva Conventions which prohibits outrages upon personal dignity, in particular humiliating and degrading treatment, applied to al-Qaeda.[52] In 2007, President Bush signed an Executive Order acknowledging the Detainee Treatment Act, specifying that Common Article 3 applies to CIA interrogations but authorizing the CIA to continue its interrogation program.[53]

---

[48] *E.g.,* Goldsmith withdrew a Yoo memorandum on warrantless National Security Agency electronic surveillance. OPR REPORT, *supra* note 22, at 28.

[49] *Id*. at 112.

[50] *Id.* at 28. The direction cautioned against "relying in any respect" on the memo. *Id.*

[51] 42 U.S.C. § 2000dd. The law was enacted in both the Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, sec. 1003, 119 Stat. 2680, 2739 (2005), and the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3474 (2006). The law defined these terms in the context of the Fifth, Eighth, and Fourteenth Amendments. The law also required DoD compliance with the Army Field Manual on Intelligence Interrogation and provided a defense to prosecution when a person, consistent with ordinary sense and understanding, would not know interrogation or detention practices were unlawful. The President issued a signing statement that he would implement the limits on interrogation "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in . . . protecting the American people from further terrorist attacks." Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006).

[52] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[53] Exec. Order No. 13440, 72 Fed. Reg. 40707 (July 20, 2007). In 2002, President Bush determined that the Geneva Conventions would apply to "our present conflict with the Taliban" although he determined he had the authority under the Constitution "to suspend Geneva as between the United States and Afghanistan." Memorandum from the President, to the Vice President, et al., subject: Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002). He further concluded that Taliban detainees as unlawful combatants did not qualify as prisoners of war, and, because the conventions did not apply to al-Qaeda, those detainees also did not qualify. *Id.* He nevertheless reaffirmed the earlier order of the Secretary of Defense (contained in Memorandum for the Chairman of the Joint Chiefs of Staff, dated Jan. 19, 2002) that "the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the

President Obama revoked the Bush executive order and directed the executive branch not to rely on any interpretation of the law governing interrogation—in other words, all the OLC opinions on the subject.[54] The Obama-era OLC also repudiated the post-9/11 opinions with respect to "the allocation of authorities between the President and Congress in matters of war and national security."[55] In 2009, the Department of Justice (DOJ) Office of Professional Responsibility (OPR) ended a five-year investigation, concluding in a not-quite 300-page report that John Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice. OPR concluded that Jay Bybee committed professional misconduct when he acted in reckless disregard of the same duty.[56] As I will discuss later, in 2010, Associate Deputy Attorney

principles of Geneva." *Id.* Between 2005 and 2007, the OLC issued several opinions to shore up the legal rationale advanced in the earlier memos but approved the continuing interrogation program and, with modification, enhanced interrogation techniques. *See* OPR REPORT, *supra* note 22, at 7-9; *see also* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Off. of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intel. Agency, subject: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Off. of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intel. Agency, subject: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Off. of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intel. Agency, subject: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Off. of Legal Counsel, to John A. Rizzo, Acting Gen. Counsel, Cent. Intel. Agency, subject: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques That May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees (July 20, 2007).

[54] Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

[55] Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., subject: Status of Certain Office of Legal Counsel Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009) [hereinafter the Bradbury Memo].

[56] OPR REPORT, *supra* note 22, at 11.

General David Margolis overturned the finding of misconduct but was critical of their work.[57]

Let's look at the OLC work in context. That context includes the environment in which the OLC found itself at the time, how the issues came to the OLC, the influence of pre-existing legal beliefs, and the role played by the attorneys involved.

First, let's examine the environment in which the OLC produced its body of work. These opinions were rendered in an "extraordinary historical context," when "policy makers, fearing that additional catastrophic terrorist attacks were imminent, strived to employ all lawful means to protect the Nation."[58] Attorneys "confronted novel and complex legal questions in a time of great danger and under extraordinary time pressure."[59] Jack Goldsmith believed fear of a new attack was the primary explanation for the August 2002 Bybee torture opinion: "Fear explains when Office of Legal Counsel pushed the envelope."[60] There was also evidence that American lives were particularly at risk at the time the torture memos were issued.[61]

It is in these kinds of circumstances when principled legal practice is challenged most. The OLC had to provide actionable timely legal advice. That is, advice that was right and precise and that was the result of dispassionate, reasoned, and thorough analysis. This can be tough in a crisis when pressure is great and time may be short.[62] Moreover, the gravity of the issues was profound. The greater the threat, the stronger the

---

[57] Memorandum from David Margolis, Associate Deputy Att'y Gen., to the Att'y Gen. and the Deputy Att'y Gen., subject: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (Jan. 5, 2010) [hereinafter the Margolis Memo].

[58] The Bradbury Memo, *supra* note 55. Jack Goldsmith related, "It is hard to overstate the impact that the incessant waves of threat reports have on the judgment of people inside the executive branch who are responsible for protecting American lives"; he quotes former Deputy Attorney General James Comey who, referring to the drumbeat of threat reporting, said, "imagine a threat so severe it becomes an obsession." THE TERROR PRESIDENCY, *supra* note 25, at 72.

[59] The Bradbury Memo, *supra* note 55, at 1.

[60] THE TERROR PRESIDENCY, *supra* note 25, at 165-66.

[61] The Margolis Memo, *supra* note 57, at 16.

[62] In the case of The Torture Memos, Yoo said he "did not feel time pressure to complete the memoranda," although "there was some time pressure towards the end because the decision to prepare the classified memorandum (addressing specific techniques as opposed to general advice) was made 'late in the game.'" OPR REPORT, *supra* note 22, at 43.

desire to drive to a desired outcome, and that can undermine principled analysis.

Second, consider how the issues came to the lawyers. A typical submission to OLC has two features: specific facts and a well-defined legal issue, and the resulting OLC opinion is typically narrowly tailored to the issues raised in the submission. Principled legal practice is most at risk when facts, legal issues, or both are not precise. And why is that? First, it risks an imprecise legal response. Second, it opens the door to broad analysis that would be unnecessary if you are responding to a narrow question, potentially leading to client extrapolation to factual circumstances you fail to recognize or contemplate. Former Deputy Assistant Attorney General Steven Bradbury and other critics have observed that several of the opinions diverged from the OLC's more typical practice of responding to discrete issues of law submitted by agencies and sought to address broader issues involving hypothetical scenarios that a nation in danger faced.[63]

Issues often don't come to you and me well-defined—and one of our tasks is to define the issue for analysis. Issue definition is crucial because it drives the scope of our analysis. Related to task definition is getting the facts on which the legal issue is based. A significant basis for the enhanced interrogation policy and the legal reviews of the policy was purported lessons learned from military SERE training—that is, training to Survive, Evade, Resist, and Escape. A substantial criticism has been that this factual predicate was inaccurate and inapposite and that the CIA did not follow the SERE protocol in any event.[64]

Third, consider how pre-existing legal beliefs influenced analysis. Critics assail the extent of John Yoo's views of Commander-in-Chief

---

[63] *See, e.g.*, The Bradbury Memo, *supra* note 55 ("In the months following 9/11, attorneys in the OLC and in the Intelligence Community confronted novel and complex legal questions in a time of great danger and under extraordinary time pressure. Perhaps reflecting this context, several of the opinions identified below do not address specific and concrete policy proposals, but rather address in general terms the broad contours of legal issues potentially raised in the uncertain aftermath of the 9/11 attacks. Thus, several of these opinions represent a departure from this Office's preferred practice of rendering formal opinions addressed to particular policy proposals and not undertaking a general survey of a broad area of the law or addressing general or amorphous hypothetical scenarios involving difficult questions of law.").

[64] *See* S. REP. NO. 113-288, at 19, 21,50, 60-64, 496 (2014).

primacy[65] as extreme and wrong. Steven Bradbury observed that part of the problem with Yoo's exposition of Presidential authority was "his entrenched scholarly view of the issue" and his "deeply ingrained view of the operative principles."[66] The result arguably is that Yoo's prior scholarship may have skewed analysis beyond what even aggressive proponents of Presidential power found acceptable. I mentioned earlier that one principle of legal practice is to adjust past experience and knowledge to the issue at hand. I suspect that John Yoo acted with intention in this regard, but his example offers us a cautionary note.

A fourth and related issue is whether the OLC attorneys were faithful to their roles as dispassionate advisors and counselors. Our clients typically value our role as honest brokers and our predisposition to support the mission, but doing so through reasoned, dispassionate legal analysis.

Controversy over the Bush-era OLC's work led nineteen former OLC leaders and attorneys to publish *Principles to Guide the Office of Legal Counsel*.[67] The first principle is: "When providing legal advice to guide contemplated executive branch action, Office of Legal Counsel should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies."[68] This echoes the seven principles I mentioned earlier. The first OLC principle continues, "The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients'

---

[65] *See* J. YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2009).

[66] OPR REPORT, *supra* note 22, at 122.

[67] Dawn E. Johnson, *Guidelines for the President's Legal Advisors (Including Principles to Guide the Office of Legal Counsel)*, 81 INDIANA L.J. 1345 (May 2006). These attorneys served in the Clinton years, with some having served in the Reagan years too. That notwithstanding, the OPR Report, and the Margolis Memo cite to these Principles, and Jack Goldsmith refers to them as well, observing that the OLC "has developed powerful cultural norms about the importance of providing the president with detached, apolitical legal advice." THE TERROR PRESIDENCY, *supra* note 25, at 33. In addition to the first principle recited in the text, guidance in the nine other principles, useful in assessing the post-9/11 OLC work and potentially useful for other practice settings, is: "advice should be thorough and forthright, and it should reflect all legal constraints" (principle 2); "legal analyses, and [OLC's] processes for reaching legal determinations, should not simply mirror those of the Federal courts, but also should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office" (principle 4), "whenever time and circumstances permit, Office of Legal Counsel should *see*k the views of all affected agencies and components of the Department of Justice before rendering final advice" (principle 8). Johnson, *supra* note 67, at 1350-53.

[68] *Id.* at 1349-50.

desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action." [69]

Most of us regularly advocate for our client's desired actions. Still, we must preserve a distinct separation between our roles as counselor and advisor on the one hand, when we provide dispassionate, reasoned, and thorough legal advice, and the role we may play at other times as an advocate on Capitol Hill or with other agencies.

Jack Goldsmith has said that legal advice to the President is not like a private attorney's advocacy of a client position, nor is it like a neutral ruling of the court, but "something inevitably, and uncomfortably, in between."[70] He observed that when he considered a proposed White House action legally problematic, especially in national security matters, he would "try to suggest ways to achieve its goals through alternative and legally available means."[71] That's familiar, isn't it? It bears repeating that the imperative to find a legally supportable means to execute a desired—and desirable—mission outcome is among the greatest strengths of military lawyers.

A corollary to the caution about the advocacy model is the fundamental principle that the decision maker, not the attorney, decides. Implicit in that principle is the idea that you should not become the decision-maker yourself. Crossing that line threatens to compromise the objectivity of our legal analysis.

Jameel Jaffer is a human rights lawyer active in national security and international humanitarian law matters, including the Guantanamo cases. In one interview, he implied that John Yoo may have departed from

---

[69] The OLC has since published its own internal guidelines. The guidelines effective in the Bush administration were less principles and more process. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., to Attorneys of the Off., Off. of Legal Counsel, subject: Best Practices for Office of Legal Counsel Opinions (May 16, 2005). That said, the Bradbury memo recites that "OLC has earned a reputation for giving candid, independent, and principled advice—even when that advice may be inconsistent with the desires of policymakers." The Obama-era OLC adopted guidelines similar to those in the text. Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Counsel, to Attorneys of the Office, subject: Best Practices for Office of Legal Counsel Legal Advice and Written Opinions (July 16, 2010) (a June 9, 2022 addendum to the memo concerns transparency of Office of Legal Counsel opinions in light of changes to Freedom of Information Act law and policy).

[70] THE TERROR PRESIDENCY, *supra* note 25, at 35. He cites Supreme Court Justice and former Attorney General Robert Jackson who said that the President should receive "the benefit of a reasonable doubt as to the law." *Id*.

[71] *Id.*

his lawyer role, saying, "I don't think that it's accurate to characterize these memos as legal advice. I think that John Yoo was a player, a central player, in authorizing torture."[72] Others have expressed a similar sentiment. In the same interview segment, Professor Yoo implied he did not think he crossed the line from his role as counselor and advisor.[73]

Blurring that line is one of the greatest dangers we face in ensuring principled legal practice.

Another of the principles to guide the OLC is to seek other executive branch views when time and circumstances permit; that principle aligns with the principle I recited earlier, which is to work in legal teams and collaborate. That did not happen here but could have,[74] to the detriment of the outcome.

Another question is whether the 9/11 OLC work product was competent. Jack Goldsmith concluded that the March 2003 Yoo memo on military interrogation was "deeply flawed" and a "blank check" for new interrogation techniques.[75] Goldsmith later described that memo and the Bybee memo as "riddled with error," that key portions were "plainly wrong," and that they were a "one-sided effort to eliminate any hurdles posed by the torture law."[76]

---

[72] *Torture Memo Authors Cleared, Debate Continues*, NPR (Feb. 23, 2010, 1:00 pm), https://www.npr.org/templates/story/story.php?storyId=124007547. More recently, Mr. Jaffer offered a critique of OLC practice and process in *Judging in Secret*, THE N. Y. REV., (Apr. 23, 2023), https://www.nybooks.com/articles/2023/04/20/judging-in-secret-office-of-legal-counsel-jameel-jaffer/.

[73] NPR, *supra* note 72.

[74] Lack of coordination was deliberate, eschewing potentially essential views of other agencies with significant equities like the State Department. Instead, circulation was to a very limited group that was reportedly a practice of White House Counsel Alberto Gonzales. Jack Goldsmith related that while this was ostensibly to avoid leaks, "I eventually came to believe that it was done to control outcomes in the opinions and minimize resistance to them." THE TERROR PRESIDENCY, *supra* note 25, at 167, 206. *See also* Dunlap, *supra* note 16, at 899-900 (referring to avoiding collaboration with military lawyers). The lack of coordination was not apparently traceable to lack of time either. *See* OPR REPORT, *supra* note 22.

[75] OPR REPORT, *supra* note 22, at 112. Deputy Attorney General Comey also told Attorney General Ashcroft that the opinion was "deeply flawed." THE TERROR PRESIDENCY, *supra* note 25, at 160.

[76] OPR REPORT, *supra* note 22, at 160. Later Attorney General Michael Mukasey called the Bybee Memo "a slovenly mistake." *Id.* Goldsmith concluded that the Bybee memo contained "numerous overbroad and unnecessary assertions of the Commander in Chief power vis-a-vis statutes, treaties and constitutional constraints, and fail[ed] adequately to

I mentioned earlier the professional responsibility investigation of Yoo and Bybee. While he overturned the misconduct finding based on his analysis of internal Justice Department guidelines, Associate Deputy Attorney General David Margolis was also critical of the quality of the legal work. Among other criticisms, he concluded that Bybee's discussion of the Commander-in-Chief power was "decidedly one-sided and conclusory" and did not disclose that the posture taken "is the subject of considerable dispute."[77] These criticisms are a significant indictment of their competence.

This all leads to the overarching question: did John Yoo engage in principled legal practice? Recall the definition I offered earlier: principled legal practice means having strong beliefs plausibly within the broadest reasonable construction of existing law and behaving consistently with them while conforming with professional rules and norms.

David Margolis concluded his review by saying, "I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client. These memoranda suggest that he failed to appreciate the enormous responsibility that comes with the authority to issue institutional decisions that carried the authoritative weight of the Department of Justice."[78]

John Yoo certainly held a strong belief in expansive Presidential authority to meet a perceived existential threat and acted consistently with that belief. Were his beliefs plausibly within the broadest reasonable construction of existing law?

Many if not most reviewing officials and commentators, but certainly not all, have concluded that Yoo's absolutist view of Presidential power exceeded any reasonable view and were similarly critical of his construction of statutes and application of legal doctrines like necessity

---

consider the precise nature of any potential interference with that power, the countervailing congressional authority to regulate the matters in question, and the case law concerning the balance of authority between Congress and the President." *Id.* at 117-18. Goldsmith cited Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38, 41-46 (1952) (Jackson, J., concurring), in respect of the balance of power between the President and Congress, that nowhere was cited in the OLC opinions. He also observed that the Torture Statute does apply to the military. OPR REPORT, *supra* note 22, at 117-18.

[77] Margolis Memo, *supra* note 57, at 45. He also observed that none of the witnesses told OPR that the position was anything less than aggressive.

[78] Margolis Memo, *supra* note 57, at 67.

and self-defense.[79] While he may have acted in good faith while serving in a critical role,[80] his critics would likely conclude that he departed from principled legal practice.

In contrast, consider Jack Goldsmith. Here was another law professor, well-regarded in conservative legal circles, solicited by the Bush-era DoD General Counsel to become his special counsel and worked on many post-9/11 issues.[81] He and Yoo were academic associates and friends.[82] But when he became Assistant Attorney General and studied the OLC body of work, he set out to reverse or constrain them, overcoming enormous internal opposition to force the withdrawal of the principal Torture Memo. And then he resigned.[83] This is an example of principled legal practice.

When David Margolis was handed the difficult mission of reviewing the professional responsibility investigation into Yoo and Bybee, he was a 45-year career attorney serving at the time in the Obama Administration, which had already repudiated John Yoo's work. He had reviewed professional responsibility findings by the OPR on behalf of the Deputy Attorney General for 17 years. His 69-page decision to reject the misconduct findings based on his analysis of the Justice Department's professional responsibility standard, while being severely critical of both

---

[79] In assessing the OLC products during this period, consider also that the Bush Administration did not entirely repudiate everything that Yoo wrote, even after the post 9/11 OLC body of work became public. And neither did the Obama-era OLC in 2009, stating that its purpose was just "to confirm that certain propositions stated in several opinions . . . in 2001-2003 respecting the allocation of authorities between the President and Congress in matters of war and national security do not reflect the current views of this Office." The Bradbury Memo, *supra* note 55, at 131. Jack Goldsmith observed that while the Clinton-era OLC sought to moderate the aggressive conception of Presidential power they perceived was espoused by the Reagan-era OLC, it issued a number of opinions espousing Presidential authority allowed disregard of conflicting statutes, approved the CIA's original rendition program, and unilateral military force in Bosnia and Haiti, and also in Kosovo, notwithstanding a tie vote in the House of Representatives that failed to approve use of force there. THE TERROR PRESIDENCY, *supra* note 25, at 36-37 (footnotes omitted).

[80] THE TERROR PRESIDENCY, *supra* note 20, at 167-68.

[81] *Id.* at 20-21.

[82] *Id.* at 21.

[83] In addition to personal reasons, Goldsmith relates that "important people inside the administration had come to question my fortitude for the job and my reliability. . . . Many of the men and women who were asked to act on the edges of the law had lost faith in me . . . . In light of all I had been through and done, I did not see how I could get that faith back. And so I quit." *Id.* at 160-62.

attorneys, resulted in withering criticism that he likely expected.[84] From my perspective, this is another example of principled legal practice, although some others might disagree.

The actions of both Goldsmith and Margolis exemplified independent professional judgment and candid advice expected of attorneys.

The Final Report on World War II Civilian Relocation and Internment

Let's look at one other historical example. In the history of the post-9/11 interrogation policy, military lawyers were heroes. Military and other government lawyers were not heroes in the World War II evacuation and internment of over 125,000 Japanese Americans and others of Japanese descent. A Commission created by Congress found that these actions were prompted by "race prejudice, war hysteria, and a failure of political leadership."[85]

A February 1942 Executive Order[86] authorized the Secretary of War and his designated commanders to create military areas from which people could be evacuated or excluded, or where restrictions could be imposed. Although the order was race-neutral, exclusion and internment would fall almost exclusively on those of Japanese descent. The following month, Congress criminalized violations of these orders.[87]

Major General Allen W. Gullion was Judge Advocate General from 1937 to November 30, 1941, when he became Provost Marshal General and, after December 7, 1941, reportedly the most persistent advocate of

---

[84] *See, e.g.*, Scott Horton, *The Margolis Memo,* HARPERS MAGAZINE (Feb. 24, 2010), https://harpers.org/2010/02/the-margolis-memo/; David Luban, *David Margolis is Wrong,* SLATE (Feb. 20, 2010), https://slate.com/news-and-politics/2010/02/john-yoo-and-jay-bybee-shouldn-t-be-home-free.html.

[85] COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 18 (1982) (quoted in Korematsu v. United States, 584 F. Supp. 1406, 1416-17 (N.D. Cal. 1984)).

[86] Exec. Order No. 9066, 7 Fed. Reg. 1497 (Feb. 19, 1942). *See* 50 U.S.C. § 21 (enacted in 1918, the Alien Enemies Act authorizes apprehension, restraint, and removal of alien enemies upon Presidential proclamation); Presidential Proclamations 2524, 6 Fed. Reg. 6321 (Dec. 10, 1941) (Japanese not naturalized), 2525, 6 Fed. Reg. 6323 (Dec. 8, 1941) (Germans not naturalized), 2526, 6 Fed. Reg. 6324 (Dec. 9, 1941) (Italians not naturalized). The order also authorized the Secretary to provide transportation, shelter, and care for persons excluded from these military areas, providing the basis for later establishment of relocation camps.

[87] Act of March 21, 1942, 56 Stat. 173 (codified in 18 U.S.C. § 97a).

evacuation, exclusion, and internment.[88] A Reserve officer and lawyer, Karl R. Bendetsen, detailed to the Office of The Judge Advocate General for a time after activation, became a principal assistant to Gullion[89] and played an outsized role in urging and executing the evacuation of Japanese from the West Coast, and in particular asserted that *Nisei*—Japanese Americans—were a more significant security threat than alien Japanese.[90]

Lieutenant General John L. DeWitt, the West Coast commander, established two military areas spanning the coast. He issued orders at the urging of Bendetsen and Gullion, excluding Japanese Americans from these areas. Most would later be interned in ten remote relocation camps in the interior.[91]

The Supreme Court affirmed convictions of Japanese Americans based on DeWitt's orders in several cases, principal among them convictions in the State of Washington of Gordon Hirabayashi[92] and Fred Korematsu in California.[93]

In April 1943, a few days before the *Hirabayashi* brief was due, attorney Edward J. Ennis reported to Solicitor General Charles Fahy that an intelligence report concluded that a selective evacuation of 10,000 Japanese Americans at most "was not only sufficient but preferable,"[94] and

---

[88] PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES 49 (1983).

[89] *See Karl Bendetsen Oral History, October 24, 1972*, HARRY S. TRUMAN LIB. MUSEUM, at 7-8, 28-29, https://www.trumanlibrary.gov/library/oral-histories/bendet1 (last visited Jan. 23, 2025).

[90] Regarding Karl Bendetsen's role in the evacuation generally, see IRONS, *supra* note 88. Bendetsen related that he was detailed to the Western Defense Command and General DeWitt placed him in command of the Wartime Civil Control Administration that executed the evacuation, resulting in his promotion from major to colonel on February 1, 1942. *See* IRONS, *supra* note 88, at 63-66, 74-78. Secretary of War Henry L. Stimson apparently espoused the same view that the Nisei were a greater threat than aliens. JOHN E. SCHMITZ, ENEMIES AMONG US 141 (2021).

[91] Exec. Order No. 9102, 7 Fed. Reg. 2165 (Mar. 18, 1942), established the civilian War Relocation Authority in the Executive Office of the President that would carry out the internment.

[92] Hirabayashi v. United States, 320 U.S. 81 (1943).

[93] Korematsu v. United States, 323 U.S. 214 (1944).

[94] Ennis told Fahy: "we must consider most carefully what our obligation to the Court is in view of the facts that the responsible Intelligence agency regarded a selective evacuation as not only sufficient but preferable." IRONS, *supra* note 88, at 204. By agreement, the Office of Naval Intelligence was responsible for intelligence concerning Japanese issues. The information was originally contained in a ten-page memorandum entitled, "Report on

urged informing the Court, since not doing so could be viewed as suppression of evidence. The Government would then be "forced to argue that individual selective evacuation would have been impractical and insufficient when we have positive knowledge that the only intelligence agency responsible for advising General DeWitt gave him advice directly to the contrary." The brief was never changed. That failure is entirely on the Solicitor General.

Around the same time, Ennis asked the Judge Advocate General, Major General Myron Cramer, for any other documents relevant to the military orders.[95] Cramer said he was aware of a report from General DeWitt and referred Ennis to DeWitt's Staff Judge Advocate, Colonel Joel F. Watson. Colonel Watson told Ennis in late April that the report "was being rushed off the press and would be available."[96] In fact, the over 600-page report had already been signed by DeWitt, printed, bound, and delivered on the same day they talked to Assistant Secretary of War McCloy,[97] but it would not reach the Solicitor General until after its release in a revised version in January 1944, more than seven months after the Court decided *Hirabayashi* and another case.

Without the DeWitt Report, the *Hirabayashi* brief asserted that evacuation was necessary because DeWitt faced the "virtually impossible task of promptly segregating the potentially disloyal from the loyal" among the Japanese Americans.[98]

DeWitt's report would have undermined the Government's position because he said, "an exact separation of the 'sheep from the goats' was unfeasible," and not because there was insufficient time to distinguish the loyal from the disloyal. Assistant Secretary McCloy, a Harvard-trained

---

Japanese Question" (Jan. 26, 1942), authored principally by Lieutenant Commander Kenneth D. Ringle. IRONS, *supra* note 88, at 202-04. At the time, Ennis headed the Alien Enemy Control Unit in the Department of Justice. He left the Department after World War II and later served as President of the American Civil Liberties Union from 1969 to 1976. *Id.*

[95] *Id.* at 206.

[96] *Id. See also* Memorandum from Edward J. Ennis, Director, Dep't of Justice Alien Enemy Control Unit, to Herbert Wechsler (Sept. 30, 1944), reproduced in Korematsu v. United States, 584 F. Supp. 1406, 1420-21 (N.D. Cal. 1984).

[97] IRONS, *supra* note 88, at 206-07.

[98] *Id.* at 211.

lawyer, apparently recognized the adverse impact of the language that indicated racial animus as a motivating factor and wanted it dropped.[99]

Colonel Bendetsen and an Army judge advocate captain on McCloy's staff erased any trace of the 1943 final report and made the revisions, producing a new report.[100] DeWitt signed the revised report, which asserted that the evacuation was impelled by military necessity.[101] General Marshall endorsed the revised DeWitt report in July 1943. The Justice Department was unaware that the report it received months later after the *Hirabayashi* decision was not the report originally signed by DeWitt. The Solicitor General's choice to ignore a known intelligence report and the War Department's suppression of the original DeWitt report resulted in defective assertions to the Court in *Hirabayashi* and the companion case.[102]

The convictions were affirmed.

In March 1944, the Supreme Court granted certiorari in *Korematsu*. By then, the Solicitor General had DeWitt's revised and sanitized Final Report. Unchanged in the revised DeWitt report was the assertion that military necessity was based substantially on the interception of numerous illicit radio transmissions, presumably from spies and saboteurs.[103] That assertion was completely at odds with a communication from the Federal Communications Commission to the Attorney General in April 1944, a month after the Supreme Court agreed to hear the *Korematsu* case, that General DeWitt knew before the evacuation orders that no radio

---

[99] *Id.* at 208-09. By contrast, the United Kingdom conducted individual loyalty hearings involving more than one hundred thousand enemy aliens in a few months. Conceding that time would have been otherwise sufficient to inquire into loyalty was at odds with prior legal argument in the 9th Circuit. *Id.*

[100] *Id.* at 210-11. The galley proofs, drafts, and memorandums relating to the original report were burned. *Id.*

[101] HEADQUARTERS W. DEF. COMMAND AND FOURTH ARMY, OFF. OF THE COMMANDING GEN., PRESIDIO OF SAN FRANCISCO, CALIFORNIA, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942, at vii (1943) [hereinafter FINAL REPORT] ("The continued presence of a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion along a frontier vulnerable to attack constituted a menace which had to be dealt with. Their loyalties were unknown and time was of the essence.").

[102] Hirabayashi v. United States, 320 U.S. 81 (1943); *see also* Yasui v. United States, 320 U.S. 115 (1943).

[103] FINAL REPORT, *supra* note 101, at 4, 8.

transmissions were determined to be illicit.[104] Solicitor General Fahy's staff warned him that the alleged illicit radio transmissions were "among the most important factors making evacuation necessary."[105]

Rather than forthrightly identifying the evidentiary conflict, the Solicitor General decided, after considerable internal discussion, to do no more than insert a footnote in the brief and, after multiple drafts, avoid any reference to the DeWitt report. Instead, they stated that the Government relied only on the facts recited in the brief itself.[106] Korematsu's conviction was affirmed.

Fundamental to the Court's decisions was its conclusion that the military orders were a legitimate exercise of the President's war powers to prevent espionage and sabotage and that it could not "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."[107] In other words, the Court's decision rested fundamentally on assumptions that undisclosed evidence in the government's hands undermined.

---

[104] IRONS, *supra* note 79, at 282–83. The Federal Communications Commission (FCC) reported that Dewitt had been personally informed before he recommended evacuation and afterward that hundreds of reports of unlawful or unidentified radio transmissions were "wholly inaccurate;" FCC investigations showed in each case there was no radio transmission or that it was legitimate. *Id.*

[105] *Id.* at 285.

[106] The footnote went through three iterations. Korematsu v. United States, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984). First, referring principally to radio transmissions, the draft said, "the recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not asks [sic] the Court to take judicial notice of the recital of those facts contained in the Report." *Id.* at 1417-18. The second draft said that the recital in the report conflicted with "the views" of the Department – as opposed to information in the Department's possession. *Id.* The final footnote omitted any reference to the conflict and said only, "We have specifically recited in this brief the facts relating to the justification for the evacuation, . . . and we rely upon the Final Report only to the extent that it relates to such facts." *Id.* Objections by Assistant Secretary of War McCloy resulted in Solicitor General Fahy dropping the signal that the government's evidence was not wholly reliable. IRONS, *supra* note 88.

[107] 320 U.S. at 99, *cited and quoted in* Korematsu v. United States, 323 U.S. 214, 218 (1944).

Forty years later, the convictions were dismissed,[108] in part because "the government knowingly withheld information from the courts" on the issue of military necessity.[109]

Concluding Thoughts

While John Yoo may have provided extreme and perhaps erroneous advice in good faith to address a perceived existential crisis after 9/11,[110] the actions of the Army and Department of Justice Attorneys in World War II are indefensible.

What are the lessons learned? Don't lie or obfuscate to the court? Get the facts right in the first place? Don't destroy or falsify documents? Easy enough.

But consider what you would do in similar high-stakes circumstances when superiors, both non-lawyers and supervising lawyers, seek to drive undesirable results. What *will* you do?

At the beginning of the hour, I referred to the Model Rules that call on us to exercise moral judgment. Let me return there in the context of the two case studies—how might morality and personal conscience figure in them? The prohibition against torture is *jus cogens*—which is to say that torture violates a norm accepted and recognized by the international community. Prohibition against racial discrimination may not be *jus cogens,* but it is abhorrent within American society, and the United States has ratified an international convention to eliminate it.[111] What would morality and personal conscience dictate for you when confronted with the issues we've discussed today? I'll leave you to ponder that the next time you're running up Observatory Hill.[112]

---

[108] Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).
[109] *Id.* at 1417.
[110] Other examples of attorney general opinions later widely criticized and repudiated were Lincoln Attorney General Edward Bates' justification for suspending the writ of habeas corpus and Franklin Roosevelt Attorney General Robert Jackson's opinion legitimating the destroyers-for-bases deal. THE TERROR PRESIDENCY, *supra* note 25, at 168, 198-99.
[111] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, ratified with reservations, June 24, 1994.
[112] For readers unfamiliar with The Judge Advocate General's Legal Center and School, some student physical readiness routines include running routes through Charlottesville, Virginia, which include a steep route up to and around the University of Virginia's McCormick Observatory.

As I close, you may wonder, am I an exemplar of the principled practice of law? I'm a practical lawyer. I think I adhere to the principles of practice I espouse to our new judge advocates. I surely drive to outcomes desired by the decision maker when there is a legal path to them, but I do not hesitate to articulate other outcomes that may be desirable because they better enable the mission or are more consistent with law and policy. Have I been a principled practitioner in all instances—I cannot claim that categorically, but I believe that I have been mostly successful in doing so for one fundamental reason. The Model Rules tell us to be guided by the approbation of professional peers. What that means to me is to seek and be guided by the views of the judge advocates and other lawyers with whom I work. They have kept me centered and principled. Lawyers like Tom Romig, with whom I served long before he was a general, and, more recently, many generations of Coast Guard judge advocates, particularly junior officers with whom I've collaborated and from whom I've learned. If you look around you, your peers, subordinates, and superiors are your guarantee of principled legal practice.

Thank you.